U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 January 2004

BALCA Case No.: 2002-INA-105
ETA Case No.: P1999-CA-09450528/ML

In the Matter of:

RANCHITO COLETERO,
Employer,

on behalf of

MARIA LOURDES RETIGUIN,
Alien.

BEFORE: **Burke, Chapman, Huddleston, Neal, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

The Board granted *en banc* review in this matter to consider "whether individual assets of the principals may be considered when assessing under 20 C.F.R. § 656.20(c)(1) an employer's ability to pay the wages of the worker filling the position for which labor certification is sought when the employer is a sole proprietorship." Upon review of the Appeal File and the arguments presented on appeal, the Board finds that the overall fiscal circumstances of the owner of a sole proprietorship should be considered when assessing its ability to pay wages. Because the panel decision erroneously focused only on the owners' farming operations and failed to take into account their overall fiscal circumstances, we vacate the panel decision and remand the case for further consideration by the Certifying Officer ("CO").

STATEMENT OF THE CASE

Employer, Ranchito Coletero, is a sole proprietorship farming operation owned and managed by Brad and Emily Miles. Employer applied for labor certification for the position of

"plant propagator," to be paid at the rate of $11.47 per hour, or $23,850 per year. (AF 193-194). The CO issued a Notice of Finding indicating intent to deny the application on the ground that the Employer did not appear to have the ability to provide permanent full time employment to the Alien. (AF 189–191). Employer submitted rebuttal which included copies of its income tax returns for the years from 1997 to 2000. Employer asserted that Ranchito Coletero has been in business for thirty years. Additionally, it asserted that it has paid yearly wages of about $10,000 to several workers for the last four years, and the average adjusted gross income for those four years was over $85,000. Employer asserted that after the CO's review of the income tax returns, Employer's commitment to farming and its ability to pay for a full time plant propagator would be evident. The CO, however, issued a Final Determination denying certification, finding that the evidence presented did not demonstrate Employer's ability to hire a plant propagator on a full time basis. (AF 10-11). The CO noted that the farm's income tax returns reflected losses from $25,000 to $30,000 a year. Additionally, the CO noted that during those four years, the Employer only hired eight harvesters and the total wage expense did not exceed $10,000.

On January 22, 2002, Employer filed its Request for Review by the Board of Alien Labor Certification Appeals. (AF 02-05). In its Request for Review, the Employer's attorney and accountant alleged that the CO misinterpreted income tax returns, and argued that the losses reflected in the income tax returns included depreciation cost that was not an actual cash expense, but an allocation of prior capital expenditures. Additionally, the adjusted yearly gross income of Employer averaged approximately $85,000. Employer's accountant expressed the opinion that Employer could hire a full time plant propagator and that it made business sense to do so.

On April 3, 2002, Employer in its appellate brief reasserted its position that the CO had erred in his interpretation of the income tax return. Employer asserted that in the last five years the adjusted gross income of Employer was $70,000 and that in the last four years the average adjusted gross income was $85,000. Additionally, Employer asserted that it had paid approximately $10,000 a year in wages.

On review, a panel of the Board affirmed the CO's denial of certification, finding that even adding depreciation expenses back in as income, Employer's profits still did not support the

payment of the worker's salary. The panel held that, as it was the farm that was the entity offering employment , the personal income of the owners could not be considered.

The Board granted *en banc* review on April 1, 2003. Only the Employer filed an appellate brief. The CO filed a letter stating that the CO would not be filing a brief, but requested that if the Board determined that the personal assets of the owners should be considered, the case be remanded for an appropriate inquiry by the CO into whether those assets evidenced the ability to pay the wages of a plant propagator. The American Immigration Lawyers Association and the American Immigration Lawyers Foundation were notified of the *en banc* proceedings, but did not file briefs.

DISCUSSION

An application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). A CO may make reasonable requests for information showing the ability to pay the wage offered as required by section 656.20(c)(1). *The Whislers*, 1990-INA-569 (Jan. 31, 1992). A CO's challenge to the sufficiency of funds have a reasonable basis in the record. *See Wild Heerbrugg Instruments, Inc*., 1990-INA-197 (May 3, 1991).

In the instant case, Employer is a sole proprietorship farming operation. The primary evidence relating to Employer's ability to pay the salary offered to the Alien is the individual tax returns of Employer's owners, Brad and Emily Miles, from 1997 to 2000. Both the CO and the panel looked only at the Schedule F, Profit or Loss From Farming, portion of those tax returns when considering Employer's ability to pay. Indeed, focusing only on Schedule F, and even adding back in the depreciation expenses, Schedule F suggests that the farming operation does not have enough yearly profits to clearly establish the ability to pay the Alien's salary. The refusal to look at the Miles' overall financial condition, however, prevented Employer from establishing that – despite the suggested lack of profits from farming shown on Schedule F – the owner's overall

financial circumstances established an ability to pay the salary.[1] Employer has consistently argued that the Miles' adjusted gross income over the period 1997 to 2000 establishes sufficient resources to pay the wages.

The CO did not file a brief on appeal, and therefore the Board has before it no argument providing any rationale for a rule that only the fiscal situation of the employing business can be considered when considering under section 656.20(c)(1) whether a sole proprietorship has sufficient funds to pay the wages or salary of an alien employed pursuant to a labor certification application. There could be many reasons why such an operation would report a loss, but the sole proprietorship nonetheless has ample funds for payment of the salary. We observe that Employer has accurately cited *O'Conner v. Attorney General of the United States*, 1987 WL 18243 (D.Mass. Sept. 29, 1987) (unpublished), for the proposition that the entire financial circumstances of a sole proprietorship employer should be considered when considering the ability to pay the wages relating to permanent alien labor certification application.[2] Employer has also accurately cited the BALCA decision in *Ohsawa America*, 1988-INA-240 (Aug. 30, 1988), in which, although the corporate employer, as of the date of application for labor certification, had been showing prior losses and a negative working capital, the panel found sufficiency of funds where the company's accountant showed that the employer had increased sales and reduced operating losses, and that the major shareholder, who had indicated a willingness to continue to fund the company, had a personal net worth of over $4,000,000. Although that case involved a corporation, it supports the proposition that personal assets of a funding source should be considered under section 656.20(c)(1). Thus, we hold that a sole proprietorship's overall fiscal circumstances should be considered when assessing under section 656.20(c)(1) an employer's ability to pay the wages or salary of the alien. Accordingly, we remand this case to permit the CO to consider whether Employer's overall fiscal condition supports a finding that it has the ability to pay the wages for the position offered.

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[1] The panel in this case had the erroneous impression that the farming operation that would employ the Alien was a distinct entity for tax purposes and therefore that it would have been improper to look beyond that operation's financial circumstances when considering the ability to pay the Alien's wages. If the farming operation had been a distinct legal entity, the panel's rationale may have been well-founded. *But see Ohsawa America*, 1988-INA-240 (Aug. 30, 1988) (discussed in text, *infra*). Employer, however, is a sole proprietorship, apparently with several business interests.

[2] In *O'Conner*, the Department of Labor had already approved the labor certification application, and the ability to pay issue arose during INS' consideration of an I-140 petition.

We observe that the issue of ability to pay under section 656.20(c)(1) is distinct from the issue of *bona fide* job opportunity under section 656.20(c)(8). In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), the Board held that a Certifying Officer (CO) may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. § 656.20(c)(8) if the CO suspects that the application misrepresented the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. Similarly, if a CO suspects that a business or sole proprietorship is creating a job merely for the purpose of promoting the alien's immigration -- or for a position that is more likely to be certified but with the unstated expectation that the alien will actually work in some other aspect of the employer's business interests – the *bona fide* job opportunity analysis may be properly invoked. Such an analysis involves a totality of the circumstances analysis, including the sufficiency of funds available to pay the wages or salary of the alien. In this regard, the mere fact that Employer has the ability to pay the wages in an absolute sense may be undercut by inadequate business activity in the area in which the Alien will be employed. To put this into immediate context, if an employer has extensive farming related business activities, but purports to employ an alien in a job for a particular business interest that is losing money, a CO might reasonably be suspicious that the job opportunity is not *bona fide*. There might be rational explanations for hiring a full-time employee in a money losing part of an operation or to show that the apparently lack of cash flow in that business operation is not what it appears on its face; but a CO would act properly in requesting an explanation if there was a reasonable doubt about the *bona fides* of the job opportunity. We have not made a finding that the facts of the instant case suggest lack of a *bona fide* job opportunity, but only seek to clarify that the ability to pay ruling above does not prevent a CO from raising other questions under the regulations that may also involve an employer's finances.

ORDER

The denial of labor certification in this matter is **VACATED** and the matter **REMANDED** to the Certifying Officer for further consideration consistent with the above. If the CO determines that the current record does not clearly establish sufficiency of funds to pay the alien's wages or

salary, or if the CO determines that additional issues need to be raised, a new Notice of Findings shall be issued providing Employer the opportunity to present additional evidence and argument.

For the Board:

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JOHN M. VITTONE
Chief Administrative Law Judge